STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2002
v CHRISTOPHER CHARLES WRIGHT, Defendant-Appellant.	No. 231386 Genesee Circuit Court LC No. 00-006670-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RASHON D. HUDGINS, Defendant-Appellant.	No. 232028 Genesee Circuit Court LC No. 00-006660-FC

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

In Docket No. 231386, defendant Christopher Charles Wright appeals by right from his convictions by a jury of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. In Docket No. 232028, defendant Rashon D. Hudgins appeals by right from his conviction by the same jury of unarmed robbery, MCL 750.530. The trial court sentenced Wright as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of fifteen to forty years for the armed robbery conviction and thirty-eight to sixty months for the felon-in-possession conviction, to be served consecutively to a two-year term for the felony-firearm conviction. The trial court sentenced Hudgins as a second-offense habitual offender, MCL 769.10, to a term of 100 to 180 months' imprisonment. We affirm.

Docket No. 231386

Wright first argues that error requiring reversal occurred because the jury heard evidence that he was previously convicted of a felony. However, because Wright stipulated to the

admission of the evidence in question, this issue has been waived for purposes of appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). The stipulation extinguished any error. See *id.* at 216.

Even if Wright had not waived the issue for appeal, we would find no basis for reversal. In *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998), this Court noted that "'adequate safeguards' can be erected to ensure that a defendant charged with both felon-in-possession and other charges arising from the same incident suffers no unfair prejudice if a single trial is conducted for all the charges." This Court concluded that "adequate safeguards" existed in *Green* because

> the fact of Green's prior felony conviction was introduced by stipulation, the specific nature of Green's prior conviction was not mentioned apart from the initial remark to the prospective jury panel, and the trial court instructed the jury that defendants were entitled to a separate determination regarding each of the charges against them. [*Id.* at 692.]

In the present case, Wright stipulated to the admission of the fact that he had a prior felony conviction, and the nature of the conviction was never disclosed to the jury. Furthermore, the trial court instructed the jury that the charges against Wright were "separate crimes," that the jury "must consider each crime separately in light of all the evidence in the case," and that the jury could find Wright "guilty of all or one or two or none of any of those crimes." The court also instructed the jury that a "past conviction is not evidence that the defendant committed the alleged crime in this case." Under these circumstances, we find that "adequate safeguards" were in place to protect Wright from any prejudice.

Next, Wright argues that error requiring reversal occurred because he was tried jointly with Hudgins. Whether to sever or join the trials of codefendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682, amended 447 Mich 1203 (1994). A defendant does not have a right to a separate trial, and a "strong policy favors joint trials in the interest of justice, judicial economy, and administration." *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993). Severance should be granted if the codefendants offer inconsistent defenses that are mutually exclusive or irreconcilable and if substantial rights will be prejudiced. *Hana*, *supra* at 346, 349. "The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993). "Moreover, '[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice.'" *Hana*, *supra* at 349, quoting *Yefsky*, *supra* at 896.

Here, Wright did not object to the joint trial. Accordingly, the joint trial issue is not preserved, and reversal is warranted only if a clear or obvious error occurred that affected the outcome of the case. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We discern no error, much less a clear or obvious error, with regard to the joint trial. Indeed, no mutually exclusive defenses were offered in this case. Each defendant merely denied committing the offenses and did not place blame on the other. The jury was not forced to believe one defendant at the expense of the other. See *Hana*, *supra* at 349. Moreover, the trial court instructed the jury they should "consider each defendant separately" and that "[e]ach defendant is entitled to have his case decided on the evidence and law that applies to him."

Wright contends, however, that substantial prejudice existed in this case because a police officer testified at trial that Hudgins told him the "other suspect" forced him at gunpoint to aid in the robbery. Wright moved for a mistrial after the officer's testimony. We cannot agree that the testimony warranted a mistrial or a separate trial. Indeed, this situation differs from that discussed in *Bruton v United States,* 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), because here, the codefendant testified at trial. During his testimony, Hudgins denied making the statement in question. He further stated that Wright never indicated to him that he had robbed the store, that the two never discussed robberies the evening of the offense, and that he saw nothing in Wright's hands when he got into the car after exiting the store. Because Hudgins testified at trial, there was no Confrontation Clause violation. See, generally, *People v Frazier (After Remand),* 446 Mich 539, 543; 521 NW2d 291 (1994). Moreover, we conclude that any prejudice resulting from Hudgins' statement was "incidental spillover prejudice" that was not sufficient to mandate a separate trial. *Hana, supra* at 349.

Wright next argues that the trial court abused its discretion by allowing the prosecutor to introduce evidence of flight. Because Wright did not object to the admission of this evidence at trial, this issue is not preserved. MRE 103(a). Therefore, we review this issue for a clear or obvious error that affected the outcome of the case. *Carines*, *supra* at 763.

Witnesses testified at trial that they observed an older, four-door Cadillac, containing the two defendants, leave the parking lot of the robbery scene without lights. Police officers testified that they located the Cadillac and defendants and ordered them to stop but that Wright ran for approximately a block and forced his way into a private home. The trial court instructed the jury that this evidence of flight did not prove guilt but could indicate that Wright had a guilty state of mind.

"It is well established in Michigan law that evidence of flight is admissible" to support an inference of "consciousness of guilt." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); see also *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Coleman, supra* at 4. Because the evidence of Wright's flight from police was admissible to show consciousness of guilt, no clear or obvious error occurred with regard to its admission.

Next, Wright argues that his multiple convictions violated his right to be free from double jeopardy. Both the United States and Michigan constitutions prohibit placing a defendant in jeopardy twice for one offense. US Const, Am V; Const 1963, art 1, § 15. These clauses "safeguard against both successive prosecutions for the same offense and multiple punishments for the same offense." *People v Dillard,* 246 Mich App 163, 165; 631 NW2d 755 (2001). The intent of the Legislature is the determining factor in analyzing whether the double jeopardy clauses have been violated. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). We must determine whether the Legislature authorized and intended multiple punishments. *People v Mitchell,* 456 Mich 693, 696; 575 NW2d 283 (1998); *People v Mayfield,* 221 Mich App 656, 661; 562 NW2d 272 (1997). If the statutes in question are aimed at distinctly different conduct, then the Legislature intended to permit multiple punishments. *Mayfield, supra* at 662.

Here, Wright argues that only one offense occurred in the present case, that involving the use of a gun to commit a robbery. According to Wright, his three convictions and sentences

constitute multiple punishments for the same offense, although he acknowledges that his felony-firearm conviction may coexist with his conviction for armed robbery because armed robbery is not an exception enumerated in the felony-firearm statute, MCL 750.227b. However, he maintains that the crime of felon-in-possession is subsumed with the offense of armed robbery. Moreover, Wright suggests that the offense of felony-firearm cannot coexist with the offense of felon-in-possession. We disagree.

In *Mitchell*, the Supreme Court noted that "'it [is] clear that the Legislature intended, with only a few narrow exceptions, that every felony committed by a person possessing a firearm result in a felony-firearm conviction.'" *Mitchell*, *supra* at 697, quoting *People v Morton*, 423 Mich 650, 656; 377 NW2d 798 (1985). This Court has determined that "the Legislature clearly intended to permit a defendant charged with felon-in-possession to be properly charged with an additional felony-firearm count." *Dillard*, *supra* at 167-168. Wright's double jeopardy argument cannot be based on his conviction of felony-firearm along with felon-in-possession. *Id.*

Regarding Wright's argument that being convicted of and sentenced for both armed robbery and felon-in-possession violated his double jeopardy protections, we conclude that these statutes are "aimed at distinctly different conduct." *Mayfield*, *supra* at 661. "[I]t is clear from the language of the armed robbery statute that the Legislature intended to prohibit takings accomplished by an assault and the wielding of a dangerous weapon." *People v Parker*, 230 Mich App 337, 343; 584 NW2d 336 (1998). The felon-in-possession statute "is aimed at protecting the public from guns in the hands of convicted felons . . .," *Mayfield*, *supra* at 662, and does not address whether the guns are used to accomplish takings. Because the statutes proscribing armed robbery and felon-in-possession are aimed at different conduct, Wright's convictions of and sentences for both offenses did not violate his double jeopardy protections. See, generally, *id.*

Finally, Wright argues that his trial attorney rendered ineffective assistance of counsel. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that counsel's error or errors likely affected the outcome of the case. *Id.*; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Wright argues that his trial counsel erred by failing to object vigorously to the consolidation of his trial with Hudgins', failing to seek a cautionary instruction with regard to Hudgins' statement discussed above, failing to object to the flight evidence, failing to present a double jeopardy argument, and failing to keep his status as a felon from the jury. Wright has not shown that the result of his trial would have been different but for his counsel's alleged errors. *Effinger*, *supra* at 69. First, the trials were properly consolidated for the reasons discussed above, and we cannot conclude that a cautionary instruction with regard to Hudgins' statement would have affected the outcome of the trial. Second, the evidence of flight was properly admitted, and the trial court gave an appropriate cautionary instruction with respect to it. Third, Wright's multiple convictions and sentences did not violate the constitutional prohibition against double jeopardy. We note that "[t]rial counsel is not required to advocate a meritless position."

People v Snider, 239 Mich App 393, 425; 608 NW2d 502 (2000). Finally, adequate safeguards were put into place at Wright's trial to protect him from any prejudice stemming from the jury's knowledge of his prior felony conviction. Wright has not shown that his trial counsel committed any unprofessional errors that affected the outcome of his trial.[1]

Docket 232028

Hudgins first argues that the prosecutor presented insufficient evidence to sustain his conviction. In determining whether sufficient evidence was presented to sustain a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992).

Hudgins was charged with armed robbery, but the jury was instructed on the lesser offense of unarmed robbery. The jury was further instructed that, pursuant to MCL 767.39, "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find that Hudgins aided Wright in the commission of a robbery by providing transportation to the place of the robbery and driving Wright away from the scene. Indeed, a witness testified that Hudgins opened the passenger door of the getaway car, apparently so that Wright could enter the car quickly after leaving the scene of the robbery. Testimony was also introduced that Hudgins drove the car away from the scene without lights, even though the robbery occurred after dark. Moreover, Hudgins attempted to flee from police and allegedly made a statement about a robbery to the police, and rolls of dimes were found in the location where Hudgins was arrested.[2] Sufficient evidence supported Hudgins' conviction.

Next, Hudgins argues that the trial court erred by allowing the admission of crime scene photographs into evidence because the prosecutor had not produced the photographs during discovery. "The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *Snider*, *supra* at 419. An abuse of discretion occurs if an unprejudiced person, considering the facts on which the trial court acted, would find no justification for the court's ruling. *Id.*

Here, even assuming that the photographs should not have been admitted a trial, we discern no basis for reversal. MCL 769.26 states that

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[1] We reject Wright's suggestion that this case must be remanded for an evidentiary hearing on the ineffective assistance of counsel issue.

[2] The robbery victim testified that rolls of coins had been stolen during the robbery.

> [n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of . . . the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

This statute "creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 493; 596 NW2d 607 (1999). "In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). "An error is deemed to have been 'outcome determinative' if it undermines the reliability of the verdict." *Id.* "In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence." *Id.*

The photographs in question merely depicted the store in which the robbery took place. The admission of the photographs was harmless because they could not possibly have affected the jury's verdict in light of the additional evidence properly introduced at trial. Reversal is unwarranted.

Hudgins next argues that the trial court imposed a disproportionately long sentence. This Court reviews sentencing decisions for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Because Hudgins' offense was committed after January 1, 1999, the statutory guidelines apply. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. MCL 769.34(2). If the minimum sentence imposed is within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the sentencing guidelines or absent inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Moreover,

> [a] party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. [MCL 769.34(10).]

Hudgins was sentenced on the unarmed robbery conviction to 100 to 180 months' imprisonment. This sentence was within the sentencing guidelines minimum sentence range of 50 to 125 months for a second-offense habitual offender. Hudgins and his attorney were given an opportunity to make corrections or additions to the presentence report. The only correction that Hudgins requested was an admission that he was the father of his son, and he did not move for resentencing below or file a proper motion to remand in this Court. Accordingly, he has no basis on which to appeal his sentence. MCL 769.34(10).

Next, Hudgins argues that the trial court erred by failing to give the advice of rights required by MCL 769.34(7) at his sentencing hearing. However, because Hudgins was sentenced within the recommended sentence range under the statutory guidelines, he was not entitled to the advice of rights required by this statute. This issue is without merit.

Finally, Hudgins argues that his conviction must be reversed because he received the ineffective assistance of counsel. Hudgins identifies three errors allegedly committed by trial counsel. First, Hudgins maintains that his trial attorney erred by failing to move for a directed verdict. However, there was sufficient evidence to support Hudgins' conviction of either armed or unarmed robbery. Hence, trial counsel was not ineffective by failing to move for a directed verdict. Counsel is not required to put forth a meritless position. *Snider*, *supra* at 425.

Hudgins also contends that trial counsel should have moved to sever his trial from Wright's. However, the court did not abuse its discretion by joining the trials of Wright and Hudgins for the reasons discussed above. Moreover, even if the two defendants had separate trials, much of the evidence of which Hudgins now complains, including the store owner's testimony about the details of the robbery and the police officers' testimony about the defendants' flight, would have been admissible at defendant Hudgins' separate trial. Hudgins' attorney was not ineffective for failing to request a severance.

Hudgins lastly argues that counsel should have requested a limiting instruction with regard to the evidence of flight. However, the trial court gave the standard cautionary instruction with regard to the flight evidence. We cannot conclude that a further instruction would have affected the outcome of the case, and thus no ineffective assistance of counsel occurred.[3] *Effinger*, *supra* at 69.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter

[3] We reject Hudgins' suggestion that this case must be remanded for an evidentiary hearing on the ineffective assistance of counsel issue.